Children of Men: Balancing the Inheritance Rights of Marital and Non-Marital Children

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CHILDREN OF MEN: BALANCING THE INHERITANCE RIGHTS OF MARITAL AND NON-MARITAL CHILDREN*

Browne Lewis**

I. INTRODUCTION

CHILDREN born out of wedlock were once the exception to the rule. They were called bastards and their rights were largely ignored. Today, however, having children out of wedlock has become commonplace in the United States. For instance, the media and the public waited anxiously for the non-marital children of Brad Pitt and Angelina Jolie as well as Tom Cruise and Katie Holmes to be born.1 The anticipated births received media coverage usually reserved for events like the presidential election and the Academy Awards.2 However, the trend to have children without the benefit of marriage is not limited to celebrities. Average U.S. citizens are routinely having children out of wedlock. In America, at least one out of every three babies born is a non-marital

* Most states have taken steps to remove the offensive terms “bastard” and “illegitimate child” from the legal landscape. See, e.g., Neb. Rev. Stat. § 43-1413 (2004) (“In any local law, ordinance or resolution, or in any public or judicial proceeding, or in any process, notice, order, decree, judgment, record, or other public document or paper, the terms bastard or illegitimate child shall not be used but the term child born out of wedlock shall be used in substitution therefore and with the same force and effect.”). However, a few states have maintained the use of illegitimate child. See, e.g., Ark. Code Ann. § 28-9-209(a)(2)(d) (2004) (noting that an “illegitimate child or his or her descendants may inherit real or personal property ... from the child’s mother”). The most common term used to refer to children born outside of marriage is “child born out of wedlock.” See, e.g., Ga. Code Ann. § 53-2-3 (West 2006). The recent trend of calling those children non-marital children has only taken hold in a few states. See, e.g., N.Y. Est. Powers & Trusts Law § 4-1.2 (McKinney 1998) (addressing inheritance by non-marital children). For purposes of this article, the term non-marital child will be used to refer to a child born outside of marriage.

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2. Id.
As more and more children continue to be born out of wedlock, society must enact laws to protect the interests of those children. They are the children of men and they are entitled to financial support both during the lives and after the deaths of their parents.

Morality aside, the parental decision to have a child out of wedlock is a choice that can create grave legal consequences for the non-marital child. The intestate succession system was designed to give preferential treatment to a decedent’s children by ensuring that they receive the bulk of his or her estate. Nevertheless, when it comes to inheriting from his or her parents, a non-marital child is not necessarily created equal in the eyes of the law. In a majority of states, marital children must merely be born in order to inherit from their fathers. On the contrary, non-marital children must take additional steps to earn the right to inherit from their fathers.

In the United States, every person has the legal right to dispose of his or her real and personal property in the matter in which he or she desires. One of the ways a person can ensure that his or her wishes are carried out is by preparing a will. The probate court will distribute the decedent’s property in accordance with the decedent’s will, provided that the document satisfies the state’s attestation requirements and is not successfully challenged on other legal grounds.


4. See Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts & Estates 86 (6th ed., 2000) (“In all jurisdictions in this country, after the spouse’s share is set aside, children and issue of deceased children take the remainder of the property to the exclusion of everyone else.”).

5. According to Dukeminier & Johanson, originally it was thought that a person did not have a constitutional right to pass the person’s property at death. Id. at 2-3 (citing Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942) (“Rights of succession to property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.”)). But see id. at 10 (“In Hodel v. Irving, the Court’s opinion appears to rest on the assumption that the right to transmit property at death is a separate, identifiable stick in the bundle of rights called property, and, if this right is taken away, compensation must be paid.”).

6. In the majority of states, in order to make a will a person must be eighteen or older and of sound mind. See, e.g., D.C. CODE ANN. § 18-102 (LexisNexis 2001) (“A will, testament, or codicil is not valid for any purpose unless the person making it is at least 18 years of age and, at the time of executing or acknowledging it as provided by this chapter, of sound and disposing mind and capable of executing a valid deed or contract.”). Sound mind means that the person must have the requisite mental capacity to create a will. See In re Estate of Killen, 937 P.2d 1368, 1371 (Ariz. Ct. App. 1996) (“To invalidate a will for lack of testamentary capacity, the contestant must show that the testator lacked at least one of the following elements: (1) the ability to know the nature and extent of his property; (2) the ability to know his relation to the persons who are the natural objects of his bounty and whose interests are affected by the terms of the instrument; or (3) the ability to understand the nature of the testamentary act.”).

7. For example, the Uniform Probate Code’s attestation requirements are as follows: “(a) a will must be: (1) in writing; (2) signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction; and (3) signed by at least two individuals, each of whom signed within a reasonable time after he [or she] witnessed either the signing of the will as described in paragraph (2) or the testator’s acknowledgment of that
grounds. In order to make the testamentary process accessible to everyone, some states allow the decedent to dispose of his or her property by using a holographic will. Although most states have simple will procedures, a significant percentage of people die without leaving a will.

The part of a decedent’s estate that is not disposed of by will is covered by the intestacy system. The intestacy system is a system for the distribution of property after death. In all fifty states and the District of Columbia, intestate succession is governed by a statutory scheme. Under those schemes, non-

signature or acknowledgment of the will.”). UNIF. PROBATE CODE § 2-502(a)(1)-(3) (2006) available at http://www.law.upenn.edu/blUarchives/ulc/upc/final2005.htm (last visited July 18, 2007). See also MO. ANN. STAT.§ 474.320 (West 1992) (“Every will shall be in writing, signed by the testator, or by some person, by his direction, in his presence; and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator.”).

8. Some of the grounds on which a will may be challenged include insane delusion, undue influence, and fraud. In order for a delusion to be insane, it must be a “belief in facts that no rational person would believe, not founded upon evidence, and not removable by evidence.” In re Estate of Aune, 478 N.W.2d 561, 564 (N.D. 1991). In order to successfully challenge a will based on the doctrine of insane delusion, the person must “establish that the will was a product of the insane delusion and that the testator, if not laboring under the insane delusion, would have differently devised the property.” Id. (citing Kingdon v. Sybrant, 158 N.W.2d 863 (N.D. 1968)). The undue influence necessary to make a will invalid is influence that “substitutes the wishes of another for those of the testator.” In re Dilios’ Will, 167 A.2d 571, 573 (Me. 1960) (internal quotation omitted). Fraud sufficient to invalidate a will occurs when the testator is deceived by a misrepresentation and, relying upon the misrepresentation, the testator takes an action he or she would not have taken but for the misrepresentation. Bohlen v. Spears, 509 S.E.2d 628, 630 (Ga. 1998).

9. See, e.g., NEV. REV. STAT. § 133.090 (2005) (“A holographic will is a will in which the signature, date and material provisions are written by the hand of the testator, whether or not it is witnessed or notarized. It is subject to no other form, and may be made in or out of this State.”). The states that recognize the validity of a holographic wills are as follows: Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Kentucky, Louisiana, Maine, Michigan, Mississippi, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. DUKEMINIER & JOHANSON, supra note 4, at 263 n.7.

10. See, e.g., CAL. PROB. CODE § 6240 (West 1991 & Supp. 2007) (statutory will form).

11. See DUKEMINIER & JOHANSON, supra note 4, at 71 (stating that most people die without leaving a will); John W. Fisher, II & Scott A. Curnutt, Reforming the Law of Intestate Succession and Elective Shares: New Solutions to Age-Old Problems, 93 W. VA. L. REV. 61, 72 (1990) (noting that “more people die intestate than testate”).

12. Most states have adopted the Uniform Probate Code that provides: “Any part of a decedent’s estate not effectively disposed of by will passes by intestate succession to the decedent’s heirs as prescribed in this Code, except as modified by the decedent’s will.” UNIF. PROBATE CODE § 2-101(a) (2006) available at http://www.law.upenn.edu/blUarchives/ulc/upc/final2005.htm (last visited July 18, 2007).

13. Intestate succession statutes determine how a person’s property will be distributed if the person dies without a will, executes an invalid will, or executes a will that only disposes of a portion of the person’s property. JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS: CASES & MATERIALS 64 (2d ed. 2003). See also Frances H. Foster, The Family Paradigm of Inheritance Law, 80 N.C. L. REV. 199, 206-207 (2001) (noting that intestate succession is composed of “default rules that apply in the absence of a will”).

marital children have the right to inherit only if they are treated as legal children. In order for a child to gain the status of a legal child, a legally recognized parent-child relationship must exist. A mother-child relationship exists between a woman and her child regardless of the status of the child's birth. Accordingly, all children have the right to inherit from their mothers. To the contrary, a child's right to inherit from his or her father depends upon the state's recognition of a father-child relationship. In all jurisdictions, under the intestacy statutes, the following three groups of children are classified as marital children and therefore have the absolute right to inherit from their fathers: (1) children born during the marriage; (2) children conceived during the marriage who are born after the father's death (posthumous children); and (3) children who are adopted. Consequently, if a man dies intestate, his step child is excluded from inheriting from him under all intestacy statutes. Two groups of children, non-marital children and posthumously-conceived children, fall into a gray area when it comes to inheriting from their fathers. These children have the legal right to inherit only if certain statutory requirements are met. This article addresses the inheritance rights of non-marital children.

In deciding how to distribute the property of a man who dies intestate, the state must consider three important interests: (1) the state's interest in the orderly disposition of property after death; (2) the non-marital child's interest in having an equal opportunity to inherit from his or her father; and (3) the marital child's interest in limiting the number of heirs in order to prevent the diminishment of his or her inheritance.

Every time the state expands the definition of "child" for inheritance purposes, it decreases the inheritance rights of marital children. Accordingly, state legislatures must balance the inheritance rights of these various groups of children while promoting the state's interest in an orderly probate process. An essential goal is carrying out the presumed intent of the decedent. The current intestacy system does not achieve these goals.

17. Id.
23. Most discussions of the inheritance rights of non-marital children do not include information about the impact those rights have on the inheritance rights of marital children.
Part II of this article briefly discusses the historical treatment of non-marital children. Part III explores the modern legal treatment of non-marital children, which consists of three distinct sections. The first section includes an analysis of several U.S. Supreme Court decisions setting forth the legal rights of non-marital children that flow from the parent-child relationship. The second section presents a comprehensive analysis of the manner in which the fifty states and the District of Columbia have dealt with the inheritance rights of non-marital children. Part III concludes with a section discussing the Uniform Parentage Act ("UPA")'s attempt to give non-marital children the opportunity to inherit from their fathers. Finally, Part IV of this article proposes changes necessary to make the intestacy system more uniform, flexible and equitable.

II. HISTORICAL TREATMENT OF NON-MARITAL CHILDREN

The adverse plight of non-marital children is part of the history of the American legal system. "[T]he incapacity of a bastard consists principally in this, that he cannot be heir to any one neither can he have heirs, but of his own body; for being nullius filius, he is therefore of kin to nobody, and has no ancestor from whom any inheritance blood can be derived." As this statement implies, non-marital children have taken a long journey from being recognized as bastards or illegitimate children to being classified as children born out of wedlock or non-marital children. Historically, the law and society were not kind to the non-marital child. Legally, the non-marital child was initially treated almost as a non-entity. As bastards, non-marital children had no legal rights to inherit from their parents. It took years of litigation, but the disability of illegitimacy was eventually removed from the non-marital child.

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24. BLACK'S LAW DICTIONARY 1099 (8th ed. 2004) ("the son of no one").
27. Comment, Legitimated Child Inherits from Father's Kin, 2 STAN. L. REV. 577, 578 (1950). See also Jo-Dee Favre-Jones, Rivera v. Minnich: Paternity Suits and the Negligible Burden of Proof, 32 ST. LOUIS U. L.J. 803, 804 (1988) (noting that the common law refused to "consider a bastard the lawful child of its ... mother; thus, a bastard could not inherit from its mother").
III. MODERN TREATMENT OF NON-MARITAL CHILDREN

A. U.S. Supreme Court Mandates

Beginning in 1968, several cases involving the legal rights of non-marital children came before the U.S. Supreme Court. The cases involved a wide range of legal issues, including immigration, financial support, civil procedure, tort, workers' compensation, probate, and social security. The decisions propounded in those cases broadly extended the legal relationship between parents and their non-marital children. The holdings subsequently changed the legal landscape for non-marital children and influenced the enactment of state intestacy statutes. Judicial decisions shaped the changing legal landscape for non-marital children. These decisions influence the enactment of state intestacy statutes.

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36. Jimenez v. Weinberger, 417 U.S. 628, 630 (1974); Mathews v. Lucas, 427 U.S. 495, 497 (1976); Califano v. Boles, 443 U.S. 282, 283 (1979); Beatty v. Weinberger, 478 F.2d 300, 301 (5th Cir. 1973), summarily aff'd, 418 U.S. 901 (1974); Davis v. Richardson, 342 F. Supp. 588, 589 (D. Conn. 1972), summarily aff'd, 409 U.S. 1069 (1972); Griffin v. Richardson, 346 F. Supp. 1226, 1228 (D. Md. 1972), summarily aff'd, 409 U.S. 1069 (1972). In order to be eligible to receive social security survival benefits, a person must be deemed a child of the insured and meet certain requirements. 42 U.S.C. § 402(d) (2000). The definition of child comes from 42 U.S.C. § 416 (2000). Under that statute, non-marital children who are eligible to inherit from their fathers under the state's intestate laws are children for purposes of receiving social security survival benefits. Id. § 416(h)(2)(A). Non-marital children may also receive benefits if any of the following conditions have been met: the deceased individual "acknowledged in writing that the [child was] his or her son or daughter"; a court decreed the deceased individual, during his lifetime, to be the child's parent; or a court ordered the deceased individual to "contribute to the support of the [child] because the [child] was his or her son or daughter"; and the acknowledgment, court order, or court decree was made prior to the insured person's death." Id. § 416(h)(3)(C)(i)-(III). Alternatively, non-marital children may receive benefits if the deceased person is shown "by evidence satisfactory to the Commissioner of Social Security to have been the mother or father of the [child], and such insured individual was living with or contributing to the support of the [child] at the time such insured individual died." Id. § 416(h)(2)(C)(ii).
1. Recognizing the Mother-Child Relationship

The early non-marital children cases were challenges based upon the Equal Protection Clause and focused upon the legal rights attached to mother-child relationship. In short, the Court had to decide whether a mother's relationship to her non-marital children was legally different from her relationship to her marital children. In 1968, the Supreme Court heard two cases involving the tort recovery rights of non-marital children and mothers of non-marital children. Both cases involved the constitutionality of Louisiana's wrongful death statute. According to the statute enacted at the time, the right to recover damages was a property right that the heirs of the persons having a right to sue could inherit. After applying the rational basis test, the Supreme Court concluded that the statute was unconstitutional for two reasons: (1) it discriminated against non-marital children by making them ineligible to recover for the wrongful death of their mother, and (2) it discriminated against the mothers of non-marital children by denying them recovery for the wrongful death of their non-marital children.


39. The statute provided in pertinent part:

Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

Levy, 391 U.S. at 69 n.1 (citing LA. CIV. CODE ANN. art. 2315 (Supp. 1967)). As used in this article, the words ‘child,’ ‘brother,’ ‘sister,’ ‘father,’ and ‘mother’ include a child, brother, sister, father, and mother, by adoption respectively.

40. Id. at 70.
41. Id. at 72.
42. Glona, 391 U.S. at 76.
In the first case, *Levy v. Louisiana*, Thelma Levy filed a wrongful death lawsuit on behalf of her sister Louise's non-marital children seeking compensation after their mother was killed. In addition, the children sought to inherit their mother's cause of action for pain and suffering.\(^43\) The Louisiana Court of Appeal affirmed the state district court's dismissal of the case.\(^44\) In reaching its decision, the appellate court interpreted the statute as limiting the right to inherit a cause of action to marital children only. The appellate court reasoned that since Louise's children were non-marital, they could not take advantage of the benefits offered by the statute.\(^45\)

In an attempt to justify its decision, the appellate court stated that the ruling was necessary to promote morality and to protect the general welfare by encouraging persons not to have children without the benefit of marriage.\(^46\) The Louisiana Supreme Court declined to hear the case; however, the U.S. Supreme Court granted certiorari.\(^47\) The Court evaluated the statute's constitutionality as applied to non-marital children.\(^48\) Relying on the rational basis\(^49\) test, the Court concluded that the statute did not withstand constitutional muster.\(^50\) The Justices opined that since the purpose of the statute was to compensate children for the loss of their parents, the status of their birth was not relevant.\(^51\) Accordingly, the Court held that non-marital children were legally entitled to the same protections as marital children.\(^52\)

The Court set forth several reasons for rejecting the state's arguments and invalidating the statute. First, the Justices reasoned that the children's dependency on their mother for support had nothing to do with their being born out of wedlock.\(^53\) Second, the Court concluded that tortfeasors should not be relieved of liability for the harm they caused to Louise just because her children were non-marital.\(^54\) Finally, the Justices determined that under Louisiana law, both parents were under a duty to support their non-marital children. Thus, if Louise had lived, she would have been obligated to provide financial support for her children. The tortfeasor wrongfully caused Louise's death, thereby taking away her ability to fulfill that duty. Accordingly, the Court held that the

\(^44\) *Id.* at 70.
\(^45\) *Id.*
\(^46\) *Id.*
\(^47\) *Id.*
\(^48\) *Id.*
\(^49\) *Id.* The rational basis test is applied to cases where the challenged activity did not impact a person in a protected class or undermine a fundamental right. *Joel v. City of Orlando*, 232 F.3d 1353, 1357 (11th Cir. 2000).
\(^50\) *Levy*, 391 U.S. at 72.
\(^51\) *Id.*
\(^52\) *Id.*
\(^54\) *Id.*
tortfeasor should be required to meet Louise’s financial obligations by compensating her children regardless of the status of their birth.55

A few months after the ruling in Levy, the Supreme Court heard a second case dealing with the constitutionality of the same Louisiana statute.56 In Glona v. American Guarantee & Liability Insurance Co., Minnie Glona sued to recover damages for the wrongful death of her non-marital child.57 After concluding that Louisiana law did not permit a mother to recover damages for the loss of her non-marital child, the Louisiana courts denied Glona’s claim.58 When the case reached the U.S. Supreme Court, the State of Louisiana attempted to justify the differential treatment of parents of non-marital children by arguing that there was a state interest in punishing illegitimacy.59 The State maintained that by disadvantageating parents of illegitimate children, it would discourage people from having children without the benefit of marriage.60

Despite Louisiana’s arguments, the Court concluded that the statute violated the Equal Protection Clause because no rational relationship existed between the state’s interest and the application of the statute.61 The Court reasoned that the true beneficiaries of the statute, as applied, were tortfeasors and not the state. The tortfeasors benefited because they were allowed to injure non-marital children with impunity. Furthermore, the Court found no rational basis because the fear of not being compensated for the wrongful death of a non-marital child would not stop women from having children out of wedlock.62

2. Recognizing the Father-Child Relationship

Advocates for non-marital children rights considered the Supreme Court’s rulings in Levy and Glona to be major victories.63 However, victory was short-lived. Several years later, the Supreme Court issued a decision that appeared to contradict Levy and Glona. In Labine v. Vincent, the Court revisited the legal rights of non-marital children.64 Labine focused on the right of non-marital children to inherit from their fathers. The Court declined to extend Levy or Glona to allow an acknowledged non-marital child to inherit from her father after he died intestate.65

55. Id.
57. Id. at 73-74.
58. Id.
59. Id. at 74-75. But see Parham v. Hughes, 441 U.S. 347, 358-59 (1979) (upholding statute that prohibited a father who had not legitimized his non-marital children from bringing a wrongful death action to recover damages after she was killed).
60. Glona, 391 U.S. at 75.
61. Id. at 75-76.
62. Id. at 75 (“It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death.”).
65. Id. at 535.
The Labine case arose as a result of the following incidents. Lou Patterson gave birth to Rita Vincent. A few months after Rita's birth, Lou and Ezra Vincent executed a health form acknowledgment that Ezra was Rita's natural father.66 As a result of the acknowledgment, Rita had the right to claim child support from her father and to be a limited beneficiary under her father's will.67 After Ezra died intestate, leaving a substantial estate, Lou attempted to have Rita be declared as Ezra's sole heir.68 Nevertheless, the administrator of Ezra's succession named Ezra's relatives as his only heirs.69 The basis of the administrator's claim was a Louisiana statute that prohibited non-marital children from inheriting from their fathers.70 The Louisiana Probate Court ruled in favor of Ezra's relatives because even though she had been acknowledged, Rita had not been legitimizized.71

Lou brought her case before the U.S. Supreme Court arguing that the Louisiana intestate succession scheme violated the Due Process Clause of the Fourteenth Amendment by allowing non-marital children to be treated differently from marital children.72 As was the case in Levy and Gona, the Supreme Court applied the rational basis test when evaluating the constitutionality of the statute. The Court determined that the statute promoted the following state interests: (1) the establishment, protection, and strengthening of family life; and (2) the regulation of the disposition of probate property.73 The Court concluded that the promotion of those state interests justified treating non-marital children differently from marital children.74

In reaching its decision, the Court emphasized that the statute was not a complete bar to the non-marital child inheriting from her father.75 There were several ways the child could have inherited. For example, Ezra could have left the child property in a will or married Lou to legitimize the child. Further, Ezra could have stated his desire to legitimize the child in his acknowledgment of paternity.76 The Court distinguished this case from Levy. In Levy, the statute completely excluded non-marital children from the list of potential plaintiffs in wrongful death actions. On the contrary, the statute at issue in Labine, gave non-marital children an opportunity to inherit from their fathers.77

Non-marital children did not have to wait long for the Supreme Court to give them yet another beneficial ruling. The Court departed slightly from its position

66. Id. at 533.
67. Id.
68. Id. at 533-34.
69. Id. at 534.
70. Id.
71. Id.
72. Id. at 535.
73. Id. at 538.
75. Id. at 539.
76. Id.
77. Id. at 535.
in *Labine* when it decided *Weber v. Aetna Casualty & Surety Co.*\(^\text{78}\) and *Gomez v. Perez.*\(^\text{79}\) In *Weber*, the Court held that dependent, unacknowledged, non-marital children were entitled to recover workers' compensation benefits related to the death of their father.\(^\text{80}\) A few months later in *Gomez*, the Court decided that non-marital children had a legal right to receive financial support from their father.\(^\text{81}\)

In 1972, Louisiana recognized three classes of children: marital children, acknowledged non-marital children, and unacknowledged non-marital children. Under the state workers' compensation statute, marital children and acknowledged non-marital children could recover;\(^\text{82}\) however, unacknowledged non-marital children could only recover if the surviving legitimate dependants had not exhausted the maximum allowable benefits.\(^\text{83}\) For example, if a man had two marital children and two unacknowledged non-marital children, the non-marital children could only recover if the claims of the two marital children did not deplete the benefits permitted by the statute. This particular statute came into play in the *Weber* case.\(^\text{84}\)

The *Weber* case arose when Henry Stokes, a man with unacknowledged marital children, was killed.\(^\text{85}\) Prior to his death, Stokes had marital children with his wife Adlay Jones Stokes. After Adlay was committed to a mental hospital, Stokes started living with Willie Mae Weber. As a result of that relationship, unacknowledged non-marital children were born.\(^\text{86}\) At the time of his death, Stokes was still living with Weber and her children. The maternal grandmother of the marital children filed a workers' compensation claim on their behalf.\(^\text{87}\) In response, the employer and its insurer impleaded Weber, who sought benefits on behalf of her non-marital children.\(^\text{88}\)

The marital children also sued a third party tortfeasor who later settled out of court.\(^\text{89}\) The trial judge awarded the four marital children the maximum allowable amount of compensation. In addition, the judge awarded the non-marital children damages. However, relying upon the workers' compensation statute,\(^\text{90}\) the judge limited the non-marital children's award.\(^\text{91}\) They could only

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\(^\text{80.}\) *Weber*, 406 U.S. at 175-76.

\(^\text{81.}\) *Gomez*, 409 U.S. at 538.

\(^\text{82.}\) *Weber*, 406 U.S. at 167-68.

\(^\text{83.}\) *Id.* at 168.

\(^\text{84.}\) *Id.* at 164.

\(^\text{85.}\) *Id.* at 165.

\(^\text{86.}\) *Id.*

\(^\text{87.}\) *Id.* at 164-65.


\(^\text{89.}\) *Id.* at 166.


Payment to dependents shall be computed and divided among them on the following basis:

1. If the widow or widower alone, thirty-two and one-half per centum wages.
2. If the widow or widower and one child, forty-six and one-quarter per centum of wages.
3. If the...
recover to the extent that the marital children had not depleted the maximum compensation benefits. The judge determined that the judgment of the marital children had been satisfied by the tort settlement. Consequently, the marital children dismissed their workers' compensation claim. The maximum compensation benefits were exhausted by the amount of the tort settlement. Thus, the non-marital children did not receive any money from the workers' compensation judgment or the tort settlement.

When the Supreme Court heard the case, the constitutionality of the workers' compensation statutory scheme was under challenge. The Court concluded that Levy was the controlling precedent because it was more factually similar to the case before it than Labine. Once the Justices determined that the reasoning of Levy applied, the non-marital children were assured victory. The Court could find no rational reason for treating unacknowledged non-marital children different from acknowledged non-marital children and marital children. The Court rejected the state's arguments that attempted to justify the differential treatment. For example, the Justices opined that persons would not stop having

widow or widower and two or more children, sixty-five per centum of wages. (4) If one child alone, thirty-two and one-half per centum of wages of deceased. (5) If two children, forty-six and one-quarter per centum of wages. (6) If three or more children, sixty-five per centum of wages. (7) If there are neither widow, widower, nor child, then to the father or mother, thirty-two and one-half per centum of wages of the deceased. If there are both father and mother, sixty-five per centum of wages. (8) If there are neither widow, widower, nor child, nor dependent parent entitled to compensation, then to one brother or sister, thirty-two and one-half per centum of wages with eleven per centum additional for each brother or sister in excess of one. If other dependents than those enumerated, thirty-two and one-half per centum of wages for one, and eleven per centum additional for each such dependent in excess of one, subject to a maximum of sixty-five per centum of wages for all, regardless of the number of dependents.

Weber, 406 U.S. at 166 n.2 (citing LA. REV. STAT. ANN. § 23:1232 (1967)).

91. Unacknowledged non-marital children were not legally considered to be children for workmen's compensation purposes. LA. CIV. CODE ANN. art. 202 (1967) read in pertinent part: "Illegitimate children who have been acknowledged by their father, are called natural children; those who have not been acknowledged by their father, or whose father and mother are incapable of contracting marriage at the time of conception, or whose father is unknown, are contradistinguished by the appellation of bastards." Weber, 406 U.S. at 167 n.3 (citing LA. CIV. CODE ANN. art. 202 (1967)). Thus, unacknowledged non-marital children were treated as the other dependents mentioned in LA. REV. STAT. ANN. § 23:1232(8) (1967) and could only recover if there were not enough surviving dependents listed in the other categories. Id. at 167-68.

92. Id. at 167.
93. Id.
94. Id.
95. Id. at 168.
96. Id. at 168-72. The Court also determined that the non-marital children in the case at bar were just as dependent on their father as the non-marital children in Levy were dependent on their mother. Id. at 169-70 ("Moreover, in Labine the intestate, unlike deceased in the present action, might easily have modified his daughter's disfavored position... Such options, however, were not realistically open to Henry Stokes. Under Louisiana law he could not have acknowledged his illegitimate children even had he desired to do so." Id. at 170-71.).
sexual relationships outside of marriage just because the children of those relationships might be disadvantaged under the workers' compensation system. Moreover, the Supreme Court determined that, as applied, the statute was not rationally related to the state's need to prevent persons with questionable paternity from filing fraudulent workers' compensation claims. The Justices reasoned that the statute's dependency requirement would alleviate problems of proof. Thus, because the Court's ruling did not eliminate the dependency requirement, "the state interest in minimizing problems of proof [was] not significantly disturbed by [the Court's] decision."

_Gomez v. Perez_ was the next Supreme Court case to address the rights of non-marital children. In _Gomez_, a mother filed a petition seeking to receive child support for her daughter from a man with whom she had a sexual relationship. The trial court concluded that the man was the biological father of the child. The court also concluded that the father was required to financially support his daughter. Nonetheless, the court refused to order the father to pay child support. The court based its decision on the premise that a man was not legally obligated to support his non-marital children.

The mother challenged the court's rulings on the ground that under the state's common law and statutory regimes, a man had a legal duty to support his marital children. The mother argued that the state's differential treatment of non-marital children regarding child support denied her daughter equal protection under the law. The Supreme Court analyzed the case in light of its rulings in _Levy_ and _Weber_. Based on that analysis, the Court ruled that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." Therefore, because the state gave marital children the right to receive financial support from their fathers, it had to provide that same opportunity to non-marital children. The Court's determination that non-marital children had the right to be financially supported by their fathers to the same extent as marital children set the stage for states to provide full or nearly full legal equality to non-marital children under their intestacy statutes.

98. Id.
99. Id. at 174.
100. Id.
101. Id. at 175.
103. Id. at 536.
104. Id.
105. Id. at 536-37.
106. Id. at 537.
107. Id. at 538.
108. Id.
109. Id.
3. Recognizing Inheritance Rights

It is appropriate to end this section with a discussion of two cases that illustrate the Supreme Court's position on the restrictions that states can place on the inheritance rights of non-marital children. The consistent theme emerging from the Supreme Court cases was that a state cannot deprive non-marital children of inheritance rights in order to discourage persons from having children out of wedlock. Thus, the Court repeatedly struck down statutes that completely barred non-marital children from inheriting from their fathers exclusively because of their birth status. Nevertheless, the Justices acknowledged that state legislatures should be given deference in the probate area. Thus, the Court permitted states to enact statutes requiring non-marital children to follow certain procedures before they could inherit from their fathers.

In 1977, the Supreme Court heard a case involving a non-marital child's constitutional challenge to a provision of the Illinois Probate Act. Jessie Trimble and Sherman Gordon had a non-marital relationship that produced a daughter, Deta Mona Trimble. After Deta's birth, the Circuit Court of Cook County issued a paternity order finding Gordon to be her father and ordering him to pay child support on her behalf. As a result, Gordon paid child support as ordered by the circuit court and "openly acknowledged [Deta] as his child." Trimble and Gordon lived together for four years before he died intestate, leaving an estate containing only an automobile. The probate division of the circuit court identified the following persons as Gordon's sole heirs: his father, mother, brother, two sisters, and his half brother. The probate court refused to classify Deta as Gordon's heir because she had not satisfied the mandates of the Probate Act. According to the statute, a non-marital child could only inherit from her father if two conditions were met to legitimize the child. First, the child's parents had to marry each other. Second, the child's father had to acknowledge the child as his child.

If Deta had been a marital child, she would have inherited her father's entire estate without having to meet any criteria. Thus, Trimble appealed the probate court decision claiming that the statute violated the Equal Protection Clause because it discriminated on the basis of illegitimacy and gender. In upholding the constitutionality of the statute, the Illinois Supreme Court emphasized the
strong state interests that were advanced by the statute. The statute's mandates enabled the state to encourage family relationships. Further, the legislature enacted the statute to establish "an accurate and efficient method of disposing of property at death."\textsuperscript{120} The Supreme Court evaluated the statute applying a rational basis standard that had more teeth than the one normally applied, but it stopped short of applying an intermediate scrutiny test. In order for the statute to withstand scrutiny it had to "bear some substantial relationship to a legitimate state purpose."\textsuperscript{121} The Court looked at the state's interests "in the promotion of (legitimate) family relationships"\textsuperscript{122} and "establish[ing] a method of property disposition."\textsuperscript{123}

The Court determined that the restrictions placed on non-marital children were not the most efficient way to encourage persons to get married before having children. The Justices reasoned that the non-marital child had no control over the decision her parents made with regard to marriage. Thus, the child in this case did not have to suffer the legal consequences of her parent's decision.\textsuperscript{124} The Court was not persuaded by the state's need to protect the integrity of the probate system from false paternity claims. In addressing that concern, the Court determined that the statute cast too wide a net because it prevented non-marital children with valid paternity claims from inheriting.\textsuperscript{125} For instance, in the case at issue, Deta could not inherit under the statute even though she had a valid paternity order and a child support order from a competent court.\textsuperscript{126}

According to the Court, the statute placed an exceptional burden on the non-marital child. Even if the father acknowledged the child, the child could not inherit unless the child's parents married. The Court felt that this two-step requirement made it virtually impossible for non-marital child to inherit. In essence, the state was barring non-marital children from inheriting from their fathers. Since the Court had condemned that practice in previous decisions, it easily decided that the statute violated the Equal Protection Clause.\textsuperscript{127}

In a case decided a year after \textit{Trimble}, the Court was again confronted with a statute that placed restrictions on the inheritance rights of non-marital children. Mario Lalli died intestate. His widow, Rosamond Lalli, was subsequently appointed administratrix of his estate.\textsuperscript{128} Then, Robert Lalli filed a petition claiming that his sister, Maureen Lalli, and he were Mario's non-marital

\textsuperscript{120} \textit{Id.} at 768.

\textsuperscript{121} \textit{Id.} at 766. \textit{See also id.} at 770 (stating that the Illinois Supreme Court held that a state has an "interest in establishing a method of property disposition" (citing \textit{In re Karas' Estate}, 329 N.E.2d 234, 238 (III. 1975))).

\textsuperscript{122} \textit{Id.} at 766.


\textsuperscript{124} \textit{Id.} at 770.

\textsuperscript{125} \textit{Id.} at 769-70.

\textsuperscript{126} \textit{Id.} at 772-73.

\textsuperscript{127} \textit{Id.} at 762.

\textsuperscript{128} \textit{Id.} at 776.

In his petition, Robert requested that they be included as heirs of their father's estate. In response, Rosamond argued that the non-marital children could not legally inherit because they had not satisfied the requirements of the state's paternity statute.

While Robert conceded that his sister and he had not met the statutory conditions, he challenged the constitutionality of the statutory bar on inheritance. Robert argued that the statute discriminated against non-marital children because it required them to present a specific kind of proof of paternity that marital children did not have to provide in order to inherit. He further contended that the proof of paternity that he submitted to the court should have been sufficient to entitle him to inherit.

The Supreme Court used the rational basis test and found the statute constitutional. The state legislature's main concern was to provide for the fair and orderly disposition of probate property by protecting against fraudulent claims. The state wanted to make sure that the decedent's intentions were honored. Therefore, it gave the father of a non-marital child an opportunity to make sure that, if he died intestate, the child would have the right to inherit from his estate. The Court determined that the state's interest was a substantial one.

(a) For the purposes of this article: (1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred. (2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child. (3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2). (4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order. (b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2).

Id. at 261 n.2 (citing N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 1967)).

130. Id.
131. Id.
132. Id.
133. Id. at 262.
134. Id.
135. Id. at 262-63. He also filed affidavits signed by persons who swore that Mario had acknowledged Robert and Maureen as his children. Id.
136. Id. at 275-76. The court framed the issue as "whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment." Id. at 273.
137. Id. at 268.
138. Id. at 271.
In addition, the Court gave several reasons why the procedure established by
the statute promoted that interest.140 The Court reasoned that the process
mandated by the statute promoted important state interests without placing an
unreasonable burden on non-marital children. Unlike the statute in Trimble, the
statute challenged in Lalli represented a middle ground that the Court thought
was equitable. Non-marital children were not precluded from inheriting from
their fathers as long as they followed the statutory procedure.141 In finding that
the statute passed constitutional muster, the Court emphasized that the procedure
set forth in the statute protected the interests of the probate courts,142 the non-marital children,143 and the alleged father.144

The procedure required by the statute had the potential to limit the number of
false claims filed before the court. Since the father was alive to dispute the
claims, persons might be reluctant to file fraudulent claims. Persons making
false paternity accusations would probably be less likely to file those claims in
court if they knew they had to confront the alleged father. On the other hand, if
the father was not around to defend himself from such claims, the floodgates
could open and the courts would be inundated. Consequently, the probate
process would be even more expensive and time-consuming.145 The statute gave
non-marital children more inheritance rights than existed prior to its
enactment.146

Further, the courts had broadly interpreted the statute to give non-marital
children the maximum chance of inheriting from their fathers.147 The Supreme
Court felt that it was important to give a man the right to present evidence
showing that he was not the father of a non-marital child. The establishment of a
father-child relationship places numerous legal obligations on a father. As a
result, the man should be afforded the opportunity to challenge false claims of
paternity. The scheme included in the challenged statute gave the man that
chance by requiring that paternity disputes be resolved during his lifetime.148

140. Id. at 271-72.
141. Id. at 273.
142. Id. at 271 (“Accuracy is enhanced by placing paternity disputes in a judicial forum during
the lifetime of the father .... The administration of an estate will be facilitated, and the possibility
of delay and uncertainty minimized, where the entitlement of an illegitimate child to notice and
participation is a matter of judicial record before the administration commences.”).
143. Id. at 273 (noting that unlike the statute in Trimble, the statute challenged in this case did
not make a large number of non-marital children ineligible to inherit from their fathers.)
144. Id. at 271 (“requiring that the order be issued during the father’s lifetime permits a man to
defend his reputation against ‘unjust accusations in paternity claims ....’”)
145. Id. at 271-72.
146. According to the legislative history of the statute, the New York Legislature wanted to
“grant to illegitimates in so far as practicable rights of inheritance on a par with those enjoyed by
legitimate children ... while protecting the important state interests [the Court] described.” Id. at
274.
147. Id. at 273.
148. Id. at 271-72.
4. Recognizing the Need for Balance

As the above cases indicate, in order for a state inheritance statute to survive a constitutional attack, it must provide non-marital children with the opportunity to inherit from their fathers. The Supreme Court has given states substantial leeway in probate matters; nevertheless, any statutory scheme that expressly or implicitly prevents non-marital children from establishing a father-child relationship for inheritance purposes would likely be invalidated. However, states are not required to permit non-marital children to have the exact same inheritance rights as marital children. Non-marital children have a different legal status than marital children. Therefore, the key is to provide equal opportunity, not strict equality.149

In drafting a statute dealing with inheritance rights of non-marital children, state legislatures must avoid extremes—total exclusion and total inclusion. Total exclusion is not fair to non-marital children because it punishes them for actions taken by their parents. On the other hand, total inclusion is not fair to the fathers or their marital children because it permits persons to file unchallenged claims against the estates of deceased men. In response to Supreme Court precedents, states have been careful to take the middle ground. Thus, statutes in most states give non-marital children the opportunity to inherit from their fathers as long as they take the steps necessary to prove paternity.

In keeping with Supreme Court mandate, all state statutes give non-marital children the right to establish a father-child relationship so they may inherit from their fathers. The major difference between the statutes appears to be the level of action that must be taken to prove paternity in order for the non-marital child to be eligible to inherit from his or her father. As the next section indicates, the statutory requirements range from simple to complex.150

B. State Statutory Schemes

As previously stated, the intestacy system gives preference to children.151 Under most state systems, children are the primary heirs of their deceased parents.152 Thus, it is critical that each state has clear criteria for establishing the parent-child relationship. In the case of mothers,153 the parent and child


153. This excludes surrogate mothers who contribute no biological material to the creation of the child.
relationship is typically established by the process of birth. In some states, the non-marital child is explicitly granted the right to inherit from and through his or her mother. However, in light of the old adage “mama’s baby, papa’s maybe,” state legislatures must intervene to establish the parent-child relationship to determine the heirs of the father. When the woman and man are married prior to the birth of the child, the problem is settled by presumptive or putative statutes. Consequently, the inheritance rights of marital children are not often in debate. In some jurisdictions, a child can become a marital child and be entitled to inherit after he or she is born.

Nonetheless, the system becomes complicated when a child is conceived out of wedlock. In response, all states and the District of Columbia have enacted some type of statutory scheme stating when a non-marital child has a right to inherit.


155. See, e.g., Ohio Rev. Code Ann. § 2105.17 (West 2005) (“Children born out of wedlock shall be capable of inheriting or transmitting inheritance from and to their mother, and from and to those whom she may inherit, or to whom she may transmit inheritance, as if born in lawful wedlock.”). It must be noted that, in the same jurisdiction, the non-marital child can only inherit from the child’s father if the father declared the child to be his heir or if the child brings a successful action to establish the father and child relationship. Ohio Rev. Code Ann. §§ 2105.15, 3117.04 (West 2005). See also Mass. Gen. Laws Ann. ch. 190 § 5 (West 2004) (“A person born out of wedlock is heir to his mother and of any person from whom his mother might have inherited, if living, and the descendants of a person born out of wedlock shall represent such person and take, by descent, any estate which such person would have taken, if living.”).

156. This is an old saying of unknown origin.

157. See, e.g., N.H. Rev. Stat. Ann. § 168-B:3(I)(a)-(b) (LexisNexis 2001) (“[A] man is presumed to be the father of a child if: (a) He and the child’s mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated for any reason, or after a decree of separation is entered by a court; (b) Before the child’s birth, he and the child’s mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared void, voidable, or otherwise invalid; and (1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination for any reason; or (2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.”).

158. See, e.g., N.H. Rev. Stat. Ann. § 168-B:3(I)(c)(1)-(3) (LexisNexis 2001) (“[A] man is presumed to be the father of a child if: (c) After the child’s birth, he and the child’s mother have married, or attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared void, voidable, or otherwise invalid; and (1) He has acknowledged his paternity of the child in a writing filed with the appropriate court or state agency; or (2) With his consent, he is named as the child’s father on the birth certificate; or (3) He is obligated to support the child under a written voluntary promise or by court order.”). See also Wis. Stat. Ann. § 852.05(3) (West 2002) (stating that a child can become a marital child if his parents marry after the child is born).
under the intestacy system. This section attempts to analyze and categorize those statutory schemes by the actions a non-marital child must take to prove paternity. In some states, the inheritance rights of non-marital children only become an issue if the child is not legitimized prior to the death of his or her father. If the parents take the steps necessary to legitimize the child, for inheritance purposes, the child is treated exactly like a marital child.

159. See, e.g., WIS. STAT. ANN. § 852.05(1)(a)-(c) (West 2002) (“A nonmarital child or the child’s issue is entitled to take in the same manner as a marital child by intestate succession from and through the child’s mother, and from and through the child’s father if any of the following applies: (a) The father has been adjudicated to be the father in a paternity proceeding under ch. 767 or by final order or judgment of a court of competent jurisdiction in another state. (b) The father has admitted in open court that he is the father. (c) The father has acknowledged himself to be the father in writing signed by him.”).

160. For instance, under the Mississippi statute, a person is only considered illegitimate if he or she has not been legitimized. MISS. CODE ANN. § 91-1-15(1)(c) (2004) (“‘Illegitimate’ means a person who at the time of his birth was born to natural parents not married to each other and said person was not legitimized by subsequent marriage to said parents or legitimized through a proper judicial proceeding.”). See also WIS. STAT. ANN. § 852.05(3) (West 2002) (providing that a child can become “a marital child by the subsequent marriage of the child’s parents . . .”).

161. One example of the legitimization process is the statutory scheme established in North Carolina under N.C. GEN. STAT. § 49-10 (2005) (“The putative father of any child born out of wedlock, whether such father resides in North Carolina or not, may apply by a verified written petition, filed in a special proceeding in the superior court of the county in which the putative father resides or in the superior court of the county in which the child resides, praying that such child be declared legitimate. The mother, if living, and the child shall be necessary parties to the proceeding, and the full names of the father, mother and the child shall be set out in the petition. A certified copy of a certificate of birth of the child shall be attached to the petition. If it appears to the court that the petitioner is the father of the child, the court may thereupon declare and pronounce the child legitimate; and the full names of the father, mother and the child shall be set out in the court order decreeing legitimation of the child.”); N.C. GEN. STAT. § 49-12 (2005) (“When the mother of any child born out of wedlock and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall, in all respects after such intermarriage be deemed and held to be legitimate and the child shall be entitled, by succession, inheritance or distribution, to real and personal property by, through, and from his father and mother as if such child had been born in lawful wedlock. In case of death and intestacy, the real and personal estate of such child shall descend and be distributed according to the Intestate Succession Act as if he had been born in lawful wedlock.”).

162. See MICH. COMP. LAWS ANN. § 700.2114(1)(e) (West 2002 & Supp. 2007) (“A child who is not conceived or born during a marriage is an individual born in wedlock if the child’s parents marry after the conception or birth of the child.”). See also R.I. GEN. LAWS § 33-1-8 (1995) (“Any such child whose parents shall lawfully intermarry and shall acknowledge him or her as their child shall be deemed legitimate.”); ARK. CODE ANN. § 28-9-209(b) (2004) (“If a man has a child or children by a woman, and afterward intermarries with her and recognizes the child or children to be his, the child or children shall be deemed and considered legitimate.”); N.C. GEN. STAT. § 29-18 (2005) (“A child born an illegitimate who shall have been legitimated in accordance with G.S. 49-10 or 49-12 or in accordance with the applicable law of any other jurisdiction, and the heirs of such child, are entitled by succession to property by, through and from his father and mother and their heirs the same as if born in lawful wedlock; and if he dies intestate, his property shall descend and be distributed as if he had been born in lawful wedlock.”); MASS. GEN. LAWS ANN. ch. 190 § 7 (West 2004) (“A person born out of wedlock whose parents have intermarried and whose father has acknowledged him as his child or has been adjudged his father . . . shall be deemed legitimate and shall be entitled to take the name of his parents to the same extent as if born in lawful wedlock.”).
Less than half of the states have adopted parentage acts that make the marital status of the parents irrelevant to a child’s right to inherit from his or her father.\footnote{163} If a non-marital child can establish paternity in some way, he or she has the right to inherit on equal terms with marital children.\footnote{164} The majority of states require parents of a non-marital child to take some type of affirmative action before the child can inherit from his or her father.\footnote{165} The main justifications for this type of approach include protection of the family, encouraging marriage, and defense of the integrity of the probate system.\footnote{166}

1. Birth Equals Inheritance Rights Unless Paternity Is Disputed

With regards to the inheritance rights of non-marital children, eighteen states and the District of Columbia have adopted statutes modeled after the UPA.\footnote{167} In each of those states, the non-marital child is on par with the marital child because he or she is legally deemed to be the child of his or her natural parents regardless of the marital status of the parents.\footnote{168} Thus, the non-marital child can inherit

\footnote{165. For instance, in Arkansas, a non-marital child may inherit from the child’s father only if one of the following requirements are met:

(1) A court of competent jurisdiction has established the paternity of the child or has determined the legitimacy of the child pursuant to subsection (a), (b), or (c), of this section;
(2) The man has made a written acknowledgment that he is the father of the child; (3) The man’s name appears with his written consent on the birth certificate as the father of the child;
(4) The mother and father intermarry prior to the birth of the child; (5) The mother and putative father attempted to marry each other prior to the birth of the child by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid; or (6) The putative father is obligated to support the child under a written voluntary promise or by court order.

ARK. CODE ANN. § 28-9-209(d) (2004).}
\footnote{166. Labine v. Vincent, 401 U.S. 532, 536 (1971) (interpreting Louisiana’s intestacy laws). See also Nolan, supra note 29, at 13 (discussing the holding in Labine).}
\footnote{167. Those states are Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Kansas, Michigan, Minnesota, Montana, Nevada, New Jersey, New Mexico, North Dakota, Rhode Island, South Dakota, Washington, Washington D.C., and Utah.}
\footnote{168. See, e.g., ALASKA STAT. § 13.12.114(a) (2006) (“Except as provided in (b)-(d) of this section, for purposes of intestate succession by, through, or from a person, an individual is the child of the individual’s natural parents, regardless of their marital status, and the parent and child relationship may be established as indicated under AS 25.20.030.”); CAL. PROB. CODE § 6450(a) (West 1991 & Supp. 2007) (“(a) The relationship of parent and child exists between a person and the person’s natural parents, regardless of the marital status of the natural parents.”); CONN. GEN. STAT. ANN. § 45a-438(b) (West 2004) (“Except as provided in section 45a-731, for purposes of intestate succession by, through or from a person, an individual is the child of his genetic parents, regardless of marital status of such parents.”) (emphasis added); KAN. STAT. ANN. § 38-1112 (2000) (“The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.”); R.I. GEN. LAWS § 33-1-8 (1995) (“A child born out of wedlock shall be capable of inheriting or transmitting inheritance on the part of the child’s
from his or her father without establishing the father-child relationship. However, if a situation arises where that relationship is disputed, the state has a statutory scheme that permits the non-marital child to establish the relationship necessary to inherit. 169

The UPA approach appears to be fair to all parties involved. This system gives non-marital children an equal opportunity to inherit from both parents. Thus, non-marital children are not disadvantaged because their parents chose to have them without the benefit of marriage. In addition, under this approach, the decedent's other heirs have the right to challenge the child's right to inherit. As a consequence, the marital children's interests are protected from persons filing false paternity claims. The integrity of the probate process is also protected because a non-marital child can be forced to prove his or her allegation of a father-child relationship. One deficiency of this type of statutory scheme is that the decedent is not given the opportunity to object to the non-marital child being considered his heir. Since the intestacy process is meant to carry out the presumed intent of the decedent, this omission is a significant shortcoming. 170 Nevertheless, any negative impact from this weakness is diminished by the administrator's right to object to claims against the decedent's estate.

2. Birth Plus Simple Parental Action Equals Inheritance Rights

In most jurisdictions, several statutory mandates must be satisfied in order for the non-marital child to inherit from his or her father. 171 The requirements mother and father in like manner as if born in lawful wedlock.

169. See COLO. REV. STAT. § 15-11-114(1) (2006) ("The parent child relationship may be established under the 'Uniform Parentage Act', article 4 of title 19, C.R.S."); KAN. STAT. ANN. § 38-1113 (2000) ("The parent and child relationship between a child and ... (b) The father may be established under this act or, in the absence of a final judgment establishing paternity, by a voluntary acknowledgment of paternity meeting the requirements of K.S.A. 38-1138 and amendments thereto, unless the voluntary acknowledgment has been revoked pursuant to K.S.A. 38-1115 and amendments thereto."); S.D. CODIFIED LAWS § 29A-2-114(c) (1997) ("The identity of the father may be established by the subsequent marriage of the parents, by a written acknowledgment by the father during the child's lifetime, by a judicial determination of paternity during the father's lifetime, or by a presentation of clear and convincing proof in the proceeding to settle the father's estate.").


171. See, e.g., OKLA. STAT. ANN. tit. 84, § 215 (West 1990) ("For inheritance purposes, a child born out of wedlock stands in the same relation to his mother and her kindred, and she and her kindred to the child, as if that child had been born in wedlock. For like purposes, every such child stands in identical relation to his father and his kindred, and the latter and his kindred to the child, whenever: (a) the father, in writing, signed in the presence of a competent witness acknowledges himself to be the father of the child, (b) the father and mother intermarried subsequent to the child's
imposed appear to be designed to prevent persons from disrupting the probate process by asserting false claims against the estates of decedents. In order to be eligible to inherit from his or her father under such statutes, a non-marital child must establish a legal father-child relationship.

According to those statutes, the necessary relationship may be established if one of the following events has occurred prior to the death of the father: (1) the child's mother and father engaged in a marriage ceremony; or (2) paternity was established by adjudication or acknowledgment. In some states, paternity may

birth, and the father, after such marriage, acknowledged the child as his own or adopted him into his family, (c) the father publicly acknowledged such child as his own, receiving it as such, with the consent of his wife, if he is married, into his family and otherwise treating it as if it were a child born in wedlock, or (d) the father was judicially determined to be such in a paternity proceeding before a court of competent jurisdiction.

See also 20 PA. CONS. STAT. ANN. § 2107(c) (West 2005) (“For purposes of descent by, from and through a person born out of wedlock, he shall be considered the child of his father when the identity of the father has been determined in any one of the following ways: (1) If the parents of a child born out of wedlock shall have married each other. (2) If during the lifetime of the child, the father openly holds out the child to be his and receives the child into his home, or openly holds the child out to be his and provides support for the child which shall be determined by clear and convincing evidence. (3) If there is clear and convincing evidence that the man was the father of the child, which may include a prior court determination of paternity.”).


173. See, e.g., MISS. CODE ANN. § 91-1-15(3)(a)-(c) (2004) (“An illegitimate shall inherit from and through the illegitimate’s natural father and his kindred if: (a) The natural parents participated in a marriage ceremony before the birth of the child, even though the marriage was subsequently declared null and void or dissolved by a court; or (b) There has been an adjudication of paternity or legitimacy before the death of the intestate; or (c) There has been an adjudication of paternity after the death of the intestate, based upon clear and convincing evidence, in an heirship proceeding under Sections 91-1-27 and 91-1-29.”).

174. See, e.g., VA. CODE ANN. § 64.1-5.1 3 (2006) (“[A] person born out of wedlock is a child of the mother. That person is also a child of the father, if: a. The biological parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage was prohibited by law, deemed null or void or dissolved by a court; or b. The paternity is established by clear and convincing evidence, including scientifically reliable genetic testing, as set forth in § 64.1-5.2 ... ”); OR. REV. STAT. § 112.105(2)(b) (2005) (“The father shall have acknowledged himself to be the father in writing signed by him during the lifetime of the child”); FLA. STAT. ANN. § 732.108(2)(a)-(c) (West 2005) (listing steps that have to be taken to make a non-marital child the “lineal descendant” of the child’s father); LA. REv. STAT. ANN. § 9:392(6) (1997) (“Once an acknowledgment of paternity is signed, the child will have inheritance rights and any rights afforded children born in wedlock.”); 755 ILL. COMP. STAT. ANN. 5/2-2(h) (West 1992) (providing that a non-marital child is the heir of his or her father if there has been an acknowledgment of paternity); N.C. GEN. STAT. § 29-19(h)(1)-(2) (2005) (“For purposes of intestate succession, an illegitimate child shall be entitled to take by, through and from: (1) Any person who has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16; (2) Any person who has acknowledged himself during his own lifetime and the child’s lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child’s lifetime in the office of the clerk of superior court of the county where either he or the child resides.”).
be established after the death of the father as long as it can be proven by "clear and convincing evidence." These mandates make sense given the goal of the intestacy system. For instance, it can be argued that if a man marries the mother of his non-marital child, he would want that child to inherit a portion of his estate. Moreover, the paternity requirement enables the court to weed out fraudulent paternity claims. The statutory conditions also protect the marital children by limiting the number of legally-recognized heirs.

On the other hand, statutes that make the inheritance rights of non-marital children contingent upon marriage or paternity determination unfairly burden non-marital children. Non-marital children are penalized for inactions over which they have no control. For example, a non-marital child cannot force his

175. See, e.g., TENN. CODE ANN. § 31-2-105(a)(2)(B) (2001) ("(a) If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person: (2) In cases not covered by subdivision (a)(1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if: (B) The paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof ...."); MO. ANN. STAT. § 474.060.2(1)-(2) (West 1992) ("That person is also a child of the father, if either of the following occur: (1) The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; (2) The paternity is established by an adjudication before the death of the father, or is established thereafter by clear and convincing proof ...."); NEB. REV. STAT. § 30-2309(2) (1995) (providing, in pertinent part, that a child born out of wedlock is "a child of the father, if .... (ii) the paternity is established by an adjudication before the death of the father or is established thereafter by strict, clear and convincing proof ...."); KY. REV. STAT. ANN. § 391.105(1)(a)-(b) (LexisNexis 1999) ("That person is also a child of the natural father if: (a) The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void, or (b) In determining the right of the child or its descendants to inherit from or through the father: 1. There has been an adjudication of paternity before the death of the father, or 2. There has been an adjudication of paternity after the death of the father based upon clear and convincing proof ...."); IDAHO CODE ANN. § 15-2-109(b)(1)-(2) (2001) ("That person is also a child of the father, if: (1) The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or (2) The paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof ...."); ALA. CODE § 43-8-48(2)(a)-(b) (1991) ("That person is also a child of the father, if: a. The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or b. The paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof ...."); ME. REV. STAT. ANN. tit. 18-A § 2-109(1)(i)-(ii) (1998) ("that person is also a child of the father if: (1) The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void, or (ii) The father adopts the child into his family; or (ii) The father acknowledges in writing before a notary public that he is the father of the child, or the paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof ....").


or her parents to participate in a marriage ceremony. In addition, a non-marital child who is under the age of majority has no way of ensuring that a paternity action is filed. Non-marital children in low-income families and families of color may be especially disadvantaged by statutory requirements that focus upon the actions of their parents. As the next section demonstrates, some states have put in place complicated statutory schemes that require non-marital children to jump through several legal hoops to earn the right to inherit from their fathers.


The Vermont probate statute permits a non-marital child to inherit from his or her father on equal terms with marital children as long as the father has “openly and notoriously claimed the child to be his own.” If the father has not taken that action, the non-marital child can only inherit if a court has determined the father to be the “putative” father of the child. Another jurisdiction that has an “open and notorious” requirement is Maryland. Iowa puts a twist on its statutory requirement by mandating that the father’s recognition of the child be “general and notorious.”

Indiana has a “relation back” type of statutory scheme. If certain statutory requirements are satisfied, the non-marital child will be treated as if his or her parents had been married when the child was born. Thus, the child would not have been born out of wedlock and would inherit on equal terms with the decedent’s marital children. Indiana’s two-tiered inheritance system for non-

179. See Foster, supra note 13, at 246 (“[F]or many African American, Mexican American, and Native American communities nonmarital cohabitation is both a cultural tradition and common practice.” (citing Cynthia Grant Bowman, A Feminist Proposal to Bring Back Common Law Marriage, 75 OR. L. REV. 709, 725-31, 767 (1996))).
181. See W. VA. CODE ANN. § 48-23-209 (LexisNexis 2004) (“‘Putative father’ means any man not deemed or adjudicated under the laws of a jurisdiction of the United States to be the father of genetic origin of a child and who claims or is alleged to be the father of genetic origin of such child.”).
183. MD. CODE ANN., EST. & TRUSTS § 1-208(b)(1)-(4) (LexisNexis 2001) (“A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his father only if the father: (1) Has been judicially determined to be the father in an action brought under the statutes relating to paternity proceedings; (2) Has acknowledged himself, in writing, to be the father; (3) Has openly and notoriously recognized the child to be his child; or (4) Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.”) (emphasis added).
184. IOWA CODE ANN. § 633.222 (West 1992) (“Unless the child has been adopted, a biological child inherits from the child’s biological father if the evidence proving paternity is available during the father’s lifetime, or if the child has been recognized by the father as his child, but the recognition must have been general and notorious, or in writing.”) (emphasis added).
185. IND. CODE ANN. § 29-1-2-7(b) (West 1999).
186. Id. § 29-1-2-7(d).
marital children assigns rights by age of the child. Like other states, in order for the non-marital child to inherit from the child's father, a successful paternity action must be brought on his or her behalf. However, Indiana's approach is unique because the time at which the paternity action must be filed depends upon the age of the non-marital children. The statute further gives younger non-marital children additional time to establish paternity.

The Georgia probate statute is written in the negative. It states as a rule that the non-marital child normally does not have a right to inherit from his or her father. Then, it lists exceptions to the rule that would permit the non-marital child to inherit. When drafting the statute, the Georgia Legislature appeared to be concerned about the possibility of false claims being made against the estate of a dead man. As a result, the non-marital child must undergo genetic testing in order to be entitled to a rebuttable presumption of paternity. The statute also lessens the likelihood that a man's estate will be inherited by someone who is not his true heir. In order for a non-marital child to have the right to inherit from his or her father, a court must legitimize the child or establish the father's paternity. If neither of these incidents has occurred, the child still has the possibility of inheriting from his or her father as long as the father he has taken actions indicating that he believed the child to be his. After the non-marital child meets any of the statutory mandates, he or she has the right to inherit from his or her father in the same manner as marital children.

187. Compare id. § 29-1-2-7(b)(1) (outlining requirements for children over 20 years of age), with § 29-1-2-7(b)(2) (outlining requirements for children under 20 years of age).

188. Id. § 29-1-2-7(b).

189. Id. § 29-1-2-7(b)(1)-(2)(B) (“(1) The paternity of a child who was at least twenty (20) years of age when the father died has been established by law in a cause of action that is filed during the father’s lifetime. (2) The paternity of a child who was less than twenty (20) years of age when the father died has been established by law in a cause of action that is filed: (A) during the father’s lifetime; or (B) within five (5) months after the father’s death.”).

190. GA. CODE ANN. § 53-2-3(2)(A) (West 2006) (“A child born out of wedlock may not inherit from or through the child’s father, the other child of the father, or any paternal kin by reason of the parental kinship, unless ....”).

191. Id. § 53-2-3(2)(A)(v) (“There is clear and convincing evidence that the child is the child of the father.”).

192. Id. § 53-2-3(2)(B)(ii) (“There shall exist a rebuttable presumption of paternity of a child born out of wedlock if parentage-determination genetic testing establishes at least a 97 percent probability of paternity. Parentage-determination genetic testing shall include, but not be limited to, red cell antigen, human leukocyte antigen (HLA), red cell enzyme, and serum protein electrophoresis tests or testing by deoxyribonucleic acid (DNA) probes.”).

193. Id. § 53-2-3(2)(A)(i) (“A court of competent jurisdiction has entered an order declaring the child to be legitimate, under the authority of Code Section 19-7-22 or such other authority as may be provided by law ....”).

194. Id. § 53-2-3(2)(A)(ii) (“A court of competent jurisdiction has otherwise entered a court order establishing paternity ....”).

195. Id. § 53-2-3(2)(A)(iii) (“The father has executed a sworn statement signed by him attesting to the parent-child relationship ....”). See also id. § 53-2-3(2)(A)(iv) (“The father has signed the birth certificate of the child ....”).

196. Id. § 53-2-3(2)(c).
The New York statute is a legitimizing statute. In order for a non-marital child to inherit from his or her father, the non-marital child must be legitimized. The statute sets out specific actions that the parents of the non-marital child must take in order for the child to be considered legitimate. Legitimization is necessary for the child to have a right to inherit from his or her father. New York gives the non-marital child more opportunities to inherit from his or her father than most jurisdictions. The statute gives the non-marital child a broad list of options when it comes to earning the right to inherit from his or her father. Hence, a non-marital child has a better chance of inheriting from his or her father in New York than in other states. Nonetheless, the non-marital child does not have unlimited access to the probate court and may be denied the right to inherit. For instance, under the terms of the statute, a non-marital child can receive child support from his or her father during the father's lifetime, and still not have the right to inherit from his or her father. Moreover, the statute gives the non-marital child's father the opportunity to challenge the non-marital child's right to inherit.

4. Time Restraints

A key argument for putting restrictions on the inheritance rights of non-marital children is the need to bring finality to the probate process. Probating an estate can be a time-consuming and expensive venture. Thus, states are reluctant to set up statutory systems that permit non-marital children unrestricted access to the probate court.

197. N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(2) (McKinney 1998) ("A non-marital child is the legitimate child of his father so that he and his issue inherit from his father and his paternal kindred if" certain incidents take place.).

198. Id. ("A non-marital child is the legitimate child of his father so that he and his issue inherit from his father and his paternal kindred if: (A) a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity or the mother and the father of the child have executed an acknowledgment of paternity pursuant to section four thousand one hundred thirty-five-b of the public health law, which has been filed with the registrar of the district in which the birth certificate has been filed or; (B) the father of the child has signed an instrument acknowledging paternity ... (C) paternity has been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own; or (D) a blood genetic marker test had been administered to the child and together with other evidence establishes paternity by clear and convincing evidence.").

199. Id. § 4-1.2(3) ("The existence of an agreement obligating the father to support the non-marital child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made or acknowledgment of paternity as prescribed by subparagraph (2). ").

200. Id. § 4-1.2(4) ("A motion for relief from an order of filiation may be made only by the father and a motion for relief from an acknowledgment of paternity may be made by the father, mother or other legal guardian of such child, or the child, provided however, such motion must be made within one year from the entry of such order or from the date of written notice as provided for in subparagraph(2). ").


In order to bring closure to the probate process, most states have restricted the time in which a non-marital child can file a claim against an estate. The majority of states provide a one-year statute of limitations. Those statutes have been deemed to be unconstitutional. In dealing with paternity actions brought for child support purposes, the Supreme Court has not been as deferential to state timing restraints.

Some states have placed additional time restrictions on the inheritance rights of non-marital children. For example, under the South Carolina statute, if the parents do not marry, the non-marital child must establish paternity within a certain time period in order to have the right to inherit. This type of time restraint may present an insurmountable impediment to a non-marital child who is under the age of majority or is disabled when the father dies. States have therefore sought to lessen this hardship by tolling the running of the time

203. See, e.g., Ohio Rev. Code Ann. § 3111.05 (West 2005) (“An action to determine the existence or nonexistence of the father and child relationship may not be brought later than five years after the child reaches the age of eighteen.”), Ark. Code Ann. § 28-9-209(f) (2004) (“Nothing contained in this section shall extend the time within which a right of inheritance or a right to a succession may be asserted beyond the time provided by law relating to distribution and closing of decedents’ estates or to the determination of heirship, or otherwise.”).


205. Mills v. Habluetzel, 456 U.S. 91, 97-103 (1981) (striking down a Texas statute that required paternity action to be filed by the time the child was one-year old because it only gave the non-marital child an illusory chance of receiving child support from the father).

206. See, e.g., S.C. Code Ann. § 62-2-109(2)(i) (1987 & Supp. 2006) (“The paternity is established by an adjudication commenced before the death of the father or within the later of eight months after the death of the father or six months after the initial appointment of a personal representative of his estate, and if after his death, by clear and convincing proof ...”), W. Va. Code Ann. § 42-1-5(c)(1)-(2) (LexisNexis 2004) (“After the death of the father, paternity shall be established if, after a hearing on the merits, the court shall find, by clear and convincing evidence, that the man is the father of the child. The civil action shall be filed in the family court of the county where the administration of the decedent’s estate has been filed or could be filed: (1) Within six months of the date of the final order of the county commission admitting the decedent’s will to probate or commencing intestate administration of the estate; or (2) If none of the above apply, within six months from the date of decedent’s death.”), Miss. Code Ann. § 91-1-15(3)(c) (2004) (“However, no such claim of inheritance shall be recognized unless the action seeking adjudication of paternity is filed within one (1) year after the death of the intestate or within ninety (90) days after the first publication of notice to creditors to present their claims, whichever is less ....”), N.C. Gen. Stat. § 29-19(b)(2) (2005) (“Notwithstanding the above provisions, no person shall be entitled to take hereunder unless he has given written notice of the basis of his claim to the personal representative of the putative father within six months after the date of the first publication or posting of the general notice to creditors.”).
Recognizing the need for uniformity in probate matters, scholars and practitioners collaborated to draft the Uniform Probate Code ("UPC") and the Uniform Parentage Act ("UPA"). The next section examines the approach the uniform acts take with regard to the inheritance rights of non-marital children.

C. Uniform Approach

Under both the UPC and the UPA, children have the right to inherit from their fathers regardless of the marital status of their parents. This approach attempts to make non-marital children equal to marital children for inheritance purposes. Hence, non-marital children are not punished because of the actions taken by their parents. States that have adopted this approach have enacted their own versions of the UPA.

207. See, e.g., W. VA. CODE ANN. § 42-1-5(d) (LexisNexis 2004) ("Any putative child who at the time of the decedent's death is under the age of eighteen years, a convict or a mentally incapacitated person may file such civil action within six months after he or she becomes of age or the disability ceases."). But see MISS. CODE ANN. § 91-1-15(3)(c) (2004) (providing "such period shall run notwithstanding the minority of the child"); VA. CODE ANN. § 64.1-5.1(4) (2006) ("However, such one-year period shall run notwithstanding the minority of such child.").

208. See, e.g., VA. CODE ANN. § 64.1-5.1(4) (2006) (permitting a person acting on behalf of the non-marital child to file an affidavit supporting paternity).


210. UNIF. PROBATE CODE § 2-114 (2006), available at http://www.law.upenn.edu/bill/archives/ule/upa/final2005.htm (last visited July 18, 2007) ("[F]or purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status.").

211. UNIF. PARENTAGE ACT § 202 (2002), available at http://www.law.upenn.edu/bill/archives/ule/upa/final2002.htm (last visited July 18, 2007) ("A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other.").

212. Id.

213. This is consistent with the reasoning of several U.S. Supreme Court cases. For example, in Weber v. Aetna Casualty & Surety Co., the Court stated:

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.


214. A discussion of state statutes is included in the previous section.
The legal obligations and rights that parents and children have with regard to one another depend upon a legal recognition of a parent-child relationship.\textsuperscript{215} Thus, in order for a child to inherit from a parent, that relationship must be established. The UPA was designed to ensure that the establishment of the parent-child relationship was not dependent upon the child's birth status.\textsuperscript{216} Under the UPA's approach, the relationship between the parents and their children exists regardless of the nature of the parents' relationship. If that relationship is disputed, the non-marital child has the right to prove the existence of the relationship.\textsuperscript{217}

Under the scheme set forth by the UPA, when the father and mother do not marry or attempt to marry, the law presumes the existence of a father-child relationship between the father and child if one of the following conditions exists: (1) before the child reaches the age of two, the father and child live in the same household and the father openly holds the child out as his natural child; or (2) the father files a written acknowledgment of paternity with an appropriate court or administrative agency.\textsuperscript{218} If the presumption is not rebutted, the child has a right to inherit equivalent to that of marital children. If neither one of the stated requirements is met, the non-marital child has the burden of proving a claim of paternity in order to be able to inherit from his or her father.\textsuperscript{219}

This uniform approach tries to remove the stigma and hardship of illegitimacy in accordance with today's public policy. More and more people are choosing to have children without the benefit of marriage.\textsuperscript{220} Furthermore, a segment of the population is not permitted to marry because of their sexual orientation.\textsuperscript{221} Thus,

\begin{itemize}
\item \textsuperscript{215} See, e.g., NEV. REV. STAT. § 126.021.3 (2005) ("Parent and child relationship" means the legal relationship between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations. It includes the mother and child relationship and the father and child relationship.).
\item \textsuperscript{216} Kotlyarevskaya & Poster, supra note 209, at 158.
\item \textsuperscript{218} Id. § 204(a)(5).
\item \textsuperscript{219} Under § 201(b):
\begin{itemize}
\item The father-child relationship is established between a man and a child by: (1) an unrebutted presumption of the man's paternity of the child under Section 204; (2) an effective acknowledgment of paternity by the man under [Article] 3, unless the acknowledgement has been rescinded or successfully challenged; (3) an adjudication of the man's paternity; (4) adoption of the child by the man; or (5) the man's having consented to assisted reproduction by his wife under [Article] 7 which resulted in the birth of the child; or (6) an adjudication confirming the man as a parent of a child born to a gestational mother if the agreement was validated under [Article] 8 or is enforceable under other law.
\end{itemize}
\item \textsuperscript{220} Louis W. Sullivan, The Doctor's RX for America's Troubled Children ... Strengthening the American Family, 2 KAN. J.L. & PUB. POL'Y 5, 6 (1992).
\end{itemize}
the children of those relationships are non-marital. No child should be held responsible for the circumstances of his or her birth. Therefore, it makes sense to have an inheritance system that gives all children the equal opportunity to inherit from their mothers and their fathers.

The UPA provides equal opportunity, but not true equality for the non-marital child. The marital child does not have to take any action for the presumption of a parent-child relationship to arise. To the contrary, for the non-marital child, the presumption of paternity arises only if his or her father takes some type of affirmative action. Under the UPA, the non-marital child is still penalized for the actions or inactions of his or her parents. It is impossible for a child that is less than two years old to take steps to live in the same household as his or her father or to force his or her father to file a written acknowledgment. The non-marital child suffers the consequences for his or her father's inaction.

The UPA's treatment of non-marital children could be justified by relying on contract principles. The marital contract implies an agreement on the part of the man to provide for children born of the marriage. Hence, the UPA's presumption is just a recognition of that promise and does not place any new duties on the father. In a non-marital situation, the agreement to support a child that is the product of the relationship cannot be implied. Consequently, the agreement has to be expressed in some fashion. Under the UPA, the expression has to take the form of one of the listed conditions. If a man engages in any one of the behaviors listed, he indicates his willingness to be responsible for the child. Thus, it is reasonable for the law to presume that he wants the non-marital child to be one of his heirs.

Currently, the UPA's approach has not been adopted by a majority of the states. Most states require some type of action before the non-marital child is permitted to be an heir of the child's father. The current state intestate system is confusing and does not reflect the actual intent of the decedent. In addition, this approach is flawed because it requires non-marital children and their parents to know and understand complicated rules. The next section will explain the actions that states should take to improve the current intestacy system through improved balance and increased flexibility.


223. The Uniform Parentage Act was enacted to do away with the differential treatment suffered by non-marital children and to provide a uniform system to govern paternity disputes. See UNIF. PARENTAGE ACT Prefatory Note (2002), available at http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.htm (last visited July 18, 2007).


225. Gary, supra note 170, at 651 ("The primary goal of intestacy laws is to carry out the decedent's presumed intent.").
IV. A BETTER APPROACH FOR ALL PARTIES CONCERNED

In many instances, non-marital children are unfairly treated by state intestate succession statutory schemes. As previously discussed, state intestacy statutes disadvantage non-marital children because they make the right to inherit too dependent on parental actions prior to and after the birth. For example, in most jurisdictions, a non-marital child cannot inherit unless paternity has been established. Generally, the individual who files the paternity action is the mother of the non-marital child. Thus, the non-marital child's right to inherit is often dependent upon his or her mother's action. The mother's inaction may prove detrimental to the child. A state intestacy system based upon uniformity and fairness would promote three fundamental interests: (1) the state's interest in protecting the integrity of the probate system; (2) the non-marital child's interest in protecting the right to be treated equally under the probate system; and (3) the marital child's interest in protecting the expectancy of inheritance under the probate system.

A. Improving the Current System

1. Recognizing the Need for Information

In order to make informed decisions, parents of non-marital children should know all of the facts and rules. State intestacy laws can be confusing. For instance, many low-income women may believe that if the father's name is on the birth certificate, the non-marital child has the right to inherit from his or her father. As a result, such women do not bother to file paternity actions as required by most state statutes. In reality, only two states deem the father's name on the birth certificate as sufficient proof of paternity to permit a non-marital child to inherit from his or her father. In both states, the father's name cannot be placed on the birth certificate without his knowledge and consent.

Women who live in common law marriage jurisdictions are also disadvantaged by lack of access to information. Many women living in those states believe that if they live with a man for a long period of time, they are

226. See Mills v. Habluetzel, 456 U.S. 91, 100 (1981) (recognizing the reasons why the mother of a non-marital child might not bring a paternity action, "[f]inancial difficulties caused by child birth expenses or a birth-related loss of income, continuing affection for the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child all encumber a mother's filing of a paternity suit within 12 months of birth").

227. In both states, the father's name cannot be placed on the birth certificate without his knowledge and consent. ARK. CODE ANN. § 28-9-209(d)(3) (2004) ("The man's name appears with his written consent on the birth certificate as the father of the child ....") (emphasis added); GA. CODE ANN. § 53-2-3(2)(A)(iv) (West 2006) ("The father has signed the birth certificate of the child.").

automatically deemed to be married. Those women do not realize that, if they do not take the steps necessary to have their relationships legally recognized as common law marriages, their children are considered non-marital children. Consequently, the women do not take the actions necessary to ensure that their children will have the legal right to inherit from their fathers.

Non-marital children often lose the right to inherit from their father because of the ignorance of his or her parents. In the probate arena, knowledge is power; therefore, states should take steps to make sure that parents understand the steps they need to take in order to enable non-marital children to inherit from their fathers. There are actions states can take to get the necessary information to the public. For instance, states could run public service announcements on local television and radio stations. Public Service Announcements could inform women about the legal consequences of having a child out of wedlock and educate parents about the steps they must take under the state’s intestacy statute to make the non-marital child eligible to inherit from his or her father. States could also require organizations that provide services to low-income women to distribute pamphlets containing information about the state’s intestacy laws. The pamphlets could include a checklist of the requirements for a non-marital child to earn the right to inherit from his or her father. In order to guarantee fairness, states should arm parents of non-marital children with the information necessary to protect the inheritance rights of those children.

2. Recognizing the Need for Uniformity

Traditionally, the inheritance process has been the domain of the state. The fact that courts recognize a probate exception indicates that states are considered the primary arbiters of probate matters. Nonetheless, uniformity is needed when it comes to the treatment of non-marital children for inheritance purposes. A homogeneous approach, like the one suggested by the UPA, would bring stability and consistency to the probate process. States have historically adopted such uniform approaches when a situation dictates action. For example, a majority of the states adopted the UPC and tailored it to fit their unique needs. States could take the same approach when dealing with inheritance rights of non-marital children by adopting the UPA and modifying it as needed to be compatible with their overall intestacy statutory scheme.


231. Christian J. Grostic, *Note, A Prudential Exercise: Abstention and the Probate Exception to Federal Diversity Jurisdiction*, 104 MICH. L. REV. 131, 132 (2005) ("At its core, the probate exception stands for the proposition that federal courts do not have the authority to probate wills or administer estates.").

232. See Vegter, *supra* note 20, at 302-03 ("Uniform acts are drafted 'to promote uniformity ... where uniformity is desirable and practicable, by voluntary action of each state government.'").
The fact that people are more mobile suggests the need for standardization. Some states place restrictions on the recognition of paternity orders from other states when satisfying intestate statutory requirements. As a result, a non-marital child that adhered to the laws of his or her birth state may nevertheless be ineligible to inherit all or part of his or her father's estate. To illustrate, consider the following situation. A man has a non-marital child in State A and that child has satisfied the requirements to inherit from him in State A. The man moves to State B and dies intestate in State B. The statutory requirements for a non-marital child to inherit in State B are different from those in State A. Further, State B does not recognize the paternity order from State A. Consequently, although the non-marital child complied with the statutory mandates of State A, he or she is unable to inherit from his or her father in State B. This outcome is unfair because the non-marital child has expectations of inheriting under the requirements of State A.

Another reason why a uniform system is appropriate is that more than one state law can govern the distribution of a decedent's property. It is unjust to require a non-marital child to know and abide by the intestacy laws of more than one state. In the majority of jurisdictions, the non-marital child has a small window of opportunity to establish the father-child relationship for inheritance purposes. Hence, the process to meet the requirements should be as simple as possible.

B. Changing the Current System

1. Providing Flexibility

The purpose of the intestacy system is to carry out the presumed intent of the decedent. The current system is too inflexible to achieve that goal. As the definition of family evolves, the intestacy system needs to expand. Thus, there should not be a set of rigid rules that attempts to apply to all situations. This "one size fits all" approach to distributing the assets of a man who dies intestate is obsolete. The intestacy system should be flexible enough to take into consideration factors such as the size of the decedent's estate, the ages of the

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234. See Mark Evans Harden & Barbara A. Lindsey-Smith, Comment, Beware, Migrating Spouses, Texas Lacks a Quasi-Community Property Probate Statute: It Could Be a Long Winter, 3 TEX. WESLEYAN L. REV. 91, 105 (1996) ("When a person dies, the laws of the state where the decedent lived at the time of his death determine the disposition of his personal property and his real property located in that state."). See also Susan Lonowski, Note, Descent and Distribution, 33 U. LOUISVILLE J. FAM. L. 768, 771 (1995) ("[T]he law of the state in which land is situated governs the transfer of that land by will or intestacy.").
236. Gary, supra note 170, at 651-52.
decedent’s children, and the relationship the decedent had with his children.\textsuperscript{238} The system I propose gives the probate court the flexibility to review all of the circumstances prior to determining how to divide a decedent’s estate.

2. Providing Balance

When creating an intestacy system, the state legislature should attempt to balance and harmonize the interests of the state, the non-marital child, and the marital child in order to produce a fair and equitable result. The intestacy distribution scheme that I recommend provides that balance.

The state has two legitimate interests with regard to the inheritance rights of an intestate decedent’s children. First, the state seeks to protect the integrity of the probate system by limiting the number of fraudulent claims that might be filed against a decedent’s estate.\textsuperscript{239} My proposal addresses this concern by requiring non-marital children to prove paternity in order to gain the right to inherit from their fathers. Second, the state wants to provide financial support for minor and disabled children. In all jurisdictions, a man is legally obligated to support his minor and disabled children. That obligation should not end with his death.\textsuperscript{240} My proposal promotes this state interest by permitting the probate court to consider the ages of the decedent’s children and requiring the court to give preference to minor and disabled children.

The non-marital child’s primary interest is to have an equal opportunity to inherit from his or her father. My proposal advances this interest by easing the burden placed upon non-marital children under the current intestacy system. This task is accomplished by allowing the probate court to accept evidence of paternity other than judicial adjudication or paternal acknowledgment by the father. Acceptable forms of proof would include, but are not be limited to, evidence that the father’s name is on the child’s birth certificate; the father made child support payments during his lifetime; the father had an intimate relationship with the child’s mother and verbally acknowledged the child as his child; or the father took the child into his household and held the child out as his child.

Marital children are interested in protecting their inheritance rights in their father’s estate from being reduced. My proposal protects the interests of marital children by making the inheritance rights of non-marital children subject to or dependent upon the inheritance rights of marital children. The current system

\textsuperscript{238} Id. at 71-73 (proposing a more flexible intestacy regime).


\textsuperscript{240} Mark L. Ascher, Curtailing Inherited Wealth, 89 MICH. L. REV. 69, 141 (1990). In making this argument, I join the numerous scholars that contend that a parent should not be able to disinherit a minor or disabled child. See, e.g., Deborah A. Batts, I Didn’t Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance, 41 HASTINGS L.J. 1197, 1202 (1990); Brian C. Brennan, Disinheritance of Dependent Children: Why Isn’t America Fulfilling Its Moral Obligation?, 14 QUINNIPIAC PROB. L.J. 125, 126 (1999); Ronald Chester, Should American Children Be Protected Against Disinheritance?, 32 REAL PROP. & TR. J. 405, 406 (1997). In addition, I embrace Louisiana’s approach of protecting young children from being disinherited. Ralph C. Brasher, Protecting the Child from Disinheritance. Must Louisiana Stand Alone?, 57 LA. L. REV. 1, 1 (1996).
gives preference to marital children by ignoring them. Marital children only have to be born to have the right to inherit. Whereas, in most states, non-marital children have to jump through legal hoops in order to gain the right to inherit from their fathers. Furthermore, a man was historically presumed to have the obligation to provide financial support for children born during the marriage even if his paternity was in doubt. 241 My proposal benefits marital children by including them in the equation and considering their interests when deciding whether to give inheritance rights to non-marital children.

3. Providing Equity

My system seeks to be fair to both marital and non-marital children; however, marital children are given a slight edge. The advantage is justified because marital children and non-marital children have different legal statuses and roles in society. Strict equality cannot be expected or guaranteed when the law addresses two distinct classes of persons. Indeed, the Supreme Court allows states to place limitations on a non-marital child’s right to inherit from his or her father. 242 Moreover, marital children have an expectancy of inheriting from their fathers. 243 That expectancy should not be thwarted by the appearance of a previously unidentified non-marital child after the father’s death. An additional reason to give preference to the marital child is that the marital child is a third party beneficiary 244 of the marital contract between the marital child’s parents.

My proposal also gives preference to minor and disabled children. This is equitable because those children are more financially dependent on their fathers than adult children. Adult children have the lifetime financial support of their fathers and the ability to encourage him to provide for them in his will. 245 If minor or disabled children are not taken care of by their fathers, the state usually assumes those obligations. In contrast, adult children are expected to support themselves.

243. This expectancy is usually not considered a legal interest unless the child was named as an heir in a prior will. See James A. Fassold, Tortious Interference with Expectancy of Inheritance: New Tort, New Traps, http://www.grayfassold.com/articles/expectancy.htm (last visited June 3, 2007).
244. See Melvin Aaron Eisenberg, Third Party Beneficiaries, 92 COLUM. L. REV. 1358, 1373-78 (1992).
245. Brennan, supra note 240, at 139 (“Minor children are in a very precarious position because they, unlike adult family members, do not have the political power to ensure their protection from disinheritance.” See also Chester, supra note 240, at 433-34 (arguing that all children should be protected from disinheritance).
4. **Proposing Reform**

   **i. Non-marital minor or disabled child vs. marital minor or disabled child**

   If a married decedent is survived by his spouse, a non-marital minor or disabled child, and a marital minor or disabled child, the non-marital minor or disabled child should take the greater share of the decedent’s estate. This is fair because the surviving spouse and mother of the marital minor or disabled child is entitled to an elective share\(^{246}\) of the decedent’s estate, while the mother of the non-marital minor or disabled child would not receive any additional resources to support that child.

   If the decedent is divorced or widowed at the time of his death and is survived by a non-marital minor or disabled child and a marital minor or disabled child, and his estate is under a certain dollar amount, the marital minor or disabled child takes the larger share of the estate. If the estate is below an established minimum dollar amount, the marital minor or disabled child should take the entire estate. This provision is based upon the assumption that a reasonable man would want his marital minor or disabled child to inherit to the exclusion of his non-marital minor or disabled child if his estate is inadequate for both children to inherit. This would not be unfair to the non-marital minor or disabled child because the decedent still has the option of drafting a will to leave property to the non-marital minor or disabled child.

   If the decedent is divorced or widowed at the time of his death and is survived by a non-marital minor or disabled child and a marital adult child, and his estate is over a certain dollar amount, the estate should be divided equally between the children.

   **ii. Non-marital minor or disabled child vs. marital adult child**

   If the decedent is survived by a non-marital minor or disabled child and a marital adult child, the statute would establish a rebuttable presumption that the non-marital minor or disabled child should take the entire estate to the exclusion of the marital adult child. This is fair because prior to his death, the man had a legal obligation to provide financial support for his minor or disabled non-marital child.\(^{247}\) Therefore, it is reasonable to conclude that he would want that child to be taken care of after his death. To the contrary, a man has no legal or moral duty to support an adult child during his lifetime or to provide for that child upon his death. Consequently, a man may disinherit his adult child.\(^{248}\)

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\(^{247}\) Breslin, *supra* note 26, at 859-60.

\(^{248}\) See Brashier, *supra* note 240, at 7-25 (setting out six reasons why the current probate system permits parents to disinherit their children).
This provision is fair to the marital adult child because that child has the opportunity to rebut the presumption. The ability to rebut the presumption is important because the decedent's estate may consist of property that the decedent inherited from the mother of the marital adult child. Hence, the decedent could reasonably prefer that the property go to the marital adult child instead of the non-marital minor or disabled child.

The marital adult child can rebut the presumption by introducing extrinsic evidence to prove that the decedent would have wanted the marital adult child to inherit to the detriment of the non-marital minor or disabled child. The evidence used to rebut the presumption may include proof that the decedent made other provisions for the financial support of the non-marital minor or disabled child, such as life insurance, inter vivos trusts, or joint bank accounts. The marital adult child may also introduce evidence of the relationship between the decedent and the non-marital minor or disabled child to rebut the presumption that the non-marital child should inherit the entire estate.

iii. Non-marital adult vs. marital minor or disabled child

If the decedent is survived by a non-marital adult child and a marital minor or disabled child, the marital minor or disabled child should inherit the entire estate. This provision is justified by the state's interest in protecting minor and disabled children. It also adheres to the wishes of most reasonable people. An adult child is not typically dependent on his or her father for financial support. Therefore, it is unreasonable for adult children to take to the detriment of minor or disabled children.

iv. Non-marital child vs. non-marital child

Some factors may justify treating certain non-marital children differently from other non-marital children for inheritance purposes. For instance, if a decedent is survived by more than one non-marital minor or disabled child, the probate court should consider the relationship between the decedent and his non-marital minor or disabled child. This approach would promote the goal of distributing a decedent's estate in accordance with his presumed intent. Therefore, a non-marital minor or disabled child known to the decedent prior to his death should take a greater share of his estate than a non-marital minor or disabled child with whom the decedent had no contact. This outcome is reasonable because the decedent probably did not provide financial support to the non-marital minor or disabled child who was unknown to him. Thus, that child has no expectation of continued financial support. However, the unknown non-marital minor or

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249. This category deals with situations where a man has non-marital children who are products of his relationships with different women.

250. I am not advocating for a system like the Chinese system that evaluates the relationship between the decedent and his heirs to determine their worthiness to inherit. See Frances H. Foster, Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment, 32 U.C. DAVIS L. REV. 77, 81-82 (1998).
disabled child should not be completely excluded from inheriting from the decedent's estate. The decedent nevertheless had a moral and arguably legal obligation to provide financial support for the child.

If a decedent is survived by a non-marital minor or disabled child (who lived in the decedent's household prior to his death) and a non-marital minor or disabled child (who lived outside of the decedent's household), the non-marital minor or disabled children should split the estate. The relationship the decedent had with the minor or disabled child who lived in his household suggests giving that child preference over the minor or disabled child who lived outside of the decedent's household. If the non-marital minor or disabled child who lived in the decedent's household is given the entire estate, that child may be unjustly enriched. The non-marital minor or disabled child who lived outside of the decedent's household is more entitled to inherit from the decedent than the non-marital minor or disabled child who lived in the decedent's household because the child who lived with the decedent received more lifetime financial support. This reasoning has already been applied by the recognition of advancements that may reduce the amount the child of a decedent is entitled to inherit. 251 It is therefore equitable for non-marital minor or disabled children to split the estate under these circumstances. If a decedent is survived by a non-marital minor or disabled child and a non-marital adult child, for the reasons previously stated, the non-marital minor or disabled child should inherit the entire estate.

The purpose of this proposed system is to grant the probate court the flexibility it needs to carry out the intent of a reasonable decedent. In deciding how to distribute the decedent's estate, the court would have the opportunity to evaluate the circumstances of each decedent on a case-by-case basis. As American families continue to change, the probate court should be given a certain amount of suppleness. My proposal is not meant to interfere with statutory rules that provide other benefits for the surviving spouse and dependent child. The system I am advocating would only apply to the decedent's remaining property after his estate has been reduced, where applicable, by the following statutory allowances: homestead, 252 personal property set-aside, 253 family allowance, 254 and dower. 255


252. A majority of states have enacted homestead laws to award the family home to the surviving spouse and minor children free of creditors' claims or to give the surviving spouse a homestead exemption. See Gregory J. Duncan, Home Sweet Home? Litigation Aspects to Minnesota's Descent of Homestead Statute, 29 WM. MITCHELL L. REV. 185, 194-200 (2002) (describing how the UPC and several states treat the homestead for inheritance purposes).

253. Some states allow the surviving spouse and dependent children to exclude the decedent's tangible personal property up to a certain value from the probate estate. See DUKEMINIER & JOHANSON, supra note 4, at 477. See also John V. Orth, Night Thoughts: Reflections on the Debate Concerning Same-Sex Marriage, 3 NEV. L.J. 560, 564 (2003) ("Related to homestead is the right of the surviving spouse and sometimes of minor children to have set aside from the probate estate certain tangible personal property of the deceased spouse up to a certain value.").

254. In order to provide financial support for the decedent's surviving spouse and dependent children while his estate is being probated, the state legislatures have enacted statutes giving the probate court the authority to award a family allowance. See Foster, supra note 13, at 219-20.
V. CONCLUSION

In the current climate in the United States, marriage is not a requirement for procreation. A woman has various reproductive options. She can have a child from a non-marital sexual relationship or through the use of artificial insemination. Thus, the number of children being born out of wedlock has increased. Historically, non-marital children were not permitted to inherit from their fathers. The U.S. Supreme Court and various state legislatures have taken actions to expand the inheritance rights of non-marital children. Unfortunately, those procedures are complicated and require non-marital children to depend upon the affirmative actions of their parents. The UPA introduces a system that allows non-marital children to inherit from their fathers on mostly equal terms with marital children, but further improvements are needed to fairly treat non-marital children for inheritance purposes. My proposed system gives the probate court flexibility to balance the interests of the state, non-marital children, and marital children. This system addresses the proper inclusion of non-marital children in intestacy statutes, but would need to be uniformly adopted by the states to accommodate family mobility and promote fairness among the states.

255. Dower entitles the widow to a life estate in one-third of her husband's qualifying land. Terry L. Turnipseed, Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death (Or How I Learned to Stop Worrying and Start Loving the French), 44 BRANDEIS L.J. 737, 738-39 (2006). Only five American states currently recognize the common law form of dower. See DUKEMINIER & JOHANSON, supra note 4, at 479. See also Ariel R. Dubler, In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State, 112 YALE L.J. 1641, 1669-71 (2003) (discussing the demise of dower). In most states retaining dower, the surviving spouse must elect to take dower, or to take a statutory share of the decedent's estate, or to take a share under the decedent's will. See Raab, supra note 246, at 600.